No. 308.
Brief of Petition for
Office Supreme Court, U. S.
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Filed Feb. 15, 1897.

Supreme Court of the United States.

CHARLES CLARKE AND ROBERT P. CLARKE,
Libelants and Appellants,

AGAINST

STEAMSHIP "ELFRIDA," PYMAN, BELL & CO.,
Claimants and Appellees.

PETITION FOR CERTIORARI.

JAMES B. & CHARLES J. STUBBS,
JOSEPH H. WILSON
and HENRY M. EARLE,
Proctors for Petitioners.

Supreme Court of the United States.

CHARLES CLARKE AND ROBERT P. CLARKE, *Libelants*,

AGAINST

STEAMSHIP "ELFRIDA," PYMAN, BELL & Co., *Claimants*.

Notice is hereby given that upon the petition of libelants above named, a copy of which is hereto annexed, and upon all the pleadings and proceedings in said cause of record in the United States Circuit Court of Appeals for the Fifth Circuit, we shall submit a motion to this honorable court for *certiorari* to remove the whole record and cause herein to this court, at the opening of the court on Monday, the 22nd day of February, 1897, or as soon thereafter as counsel can be heard, at the capitol in the city of Washington.

Galveston, Texas, February 1, 1897.

JAMES B. & CHARLES J. STUBBS,
JOS. H. WILSON, AND
HENRY M. EARLE,
Counsel for Libelants and Appellees, Charles Clarke and Robert P. Clarke.

To

MESSRS. WM. B. LOCKHART AND CONVERS & KIRLIN.

TO THE SUPREME COURT OF THE UNITED STATES:

The petition of Charles Clarke and Robert P. Clarke for a writ of *certiorari* to the honorable judges of the Circuit Court of Appeals for the Fifth Circuit to require that the whole record and cause be removed into the Supreme Court in a certain suit in admiralty, wherein the petitioners are libelants against the steamship Elfrida, whereof Pyman, Bell & Co., are claimants, respectfully shows:

1. Applicants proceeded against the steamship Elfrida to enforce a contract made October 15, 1894, between the steamer, acting through her master, and applicants, by the terms of which they undertook to float and place in a safe anchorage the Elfrida, then stranded west of the jetty at the mouth of the Brazos river, on the coast of Texas; to furnish all labor and material therefor at their cost, including a diver and necessary apparatus to survey said vessel, and to complete the work within twenty-one days, for which, if successful, they were to receive $22,000.00. The master, however, reserved the right to abandon the ship in favor of applicants in lieu of the $22,000.00, if he so desired. Should the applicants fail to float and place her in a position of safety within the twenty-one days, they were not to be paid anything. The use of the crew and engines of the steamer were placed at the disposal of applicants. The Elfrida had been driven up on the beach a distance of one thousand feet from water of sufficient depth to float her. She drew eleven feet, ten inches, and was imbedded in the sand about six feet at the bow and four feet at the stern. Her draught, after pumping out water ballast, was nine feet. A strong wind and sea had forced her over the jetty on October 6, 1894. On the next day a cable chain and wire rope attached to the anchors, which had been let go, broke in two, and, with

the anchors, were lost, and so she was driven further up on the beach. The two following days the sea was smooth and the wind light. On October 10th a strong southerly gale and a high sea caused her to bump and strain heavily. The weather continued bad until the 13th, when it moderated; on the 14th and 15th a strong southeast gale and very high sea prevailed, but the ship was fast imbedded in the sand and did not thump. On the 16th the weather was again fair, and on the 17th it was very fine. On this day the vessel was taken off by applicants, who had been several days in securing and equipping the necessary vessels and plant for that purpose. The master had previously ineffectually attempted to take her off with the aid of her own anchors, cable, gear and a tugboat, but had failed, losing two anchors and cables and straining the ship's appliances. She was practically helpless for at least eight days before the contract for salvage was made. From the time she went ashore, the master was in communication with the agent of the ship at Galveston, who also had a representative upon the ground, and with Lloyds' agent, in the interest of the underwriters, who was on the vessel two days after it stranded, and by cable with her owners. Before he made the contract, the master acquainted himself fully with the nature of the shore and the serious conditions, as well as the likelihood of the ship being damaged or lost, and endeavored to make arrangements for her salvage with the lighter company at Galveston, but could not come to any agreement with them. He also sought information and advice from the pilots at Velasco and the masters of other vessels in that port, and after the fullest inquiry and investigation, and after refusing an offer made by applicants to undertake the floating of the ship for such compensation as the United States Court might award, he concluded to solicit bids. The ship's and Lloyds' agents concurred in this course.

In response, he received two proposals, one offering to do the work for $24,000.00, the other for $22,000.00. He cabled the lowest to his owners and was instructed to accept it, if lower impossible. *"No cure, no pay."*

Under this authority he entered into a contract with applicants as above set forth. At that time, according to the evidence and without conflict, all parties thought the matter of floating the ship would be a difficult and tedious task, necessarily taking time, and uncertain as to the result. That the master and owners so believed is shown by the fact that they required the contractors to do the work in twenty-one days, and stipulated for the option to abandon the ship in lieu of paying the compensation agreed upon, and that the contractors so believed is shown by their extensive preparations. They hired a large force of men, between thirty and forty, procured nearly a month's supplies, cables, chains, anchors, two tug boats, two lighters and two schooners, fully manned and equipped. Some of this plant belonged to them, but the schooners and lighters and their anchors and chains were hired. For one of the lighters they agreed to pay $6500 if she should be lost. All this property, worth about $50,000, was exposed to risk of loss or damage in the breakers, or by contact with the jetties, upon which the Elfrida struck. They were engaged about five and a half days in preparations and work, and by means of their appliances, skill and experience, with very favorable weather and high tides, the Elfrida was floated. The means used was by planting heavy anchors in deep water, with the aid of a tug and barges, from which cables and lines were carried to the vessel and heaved on with her winches and the steamer thus gradually worked from the bed in which she laid and pulled about one thousand feet until she was afloat. She was worth, according to the evidence, from $90,000 to $110,000.

She was insured for the former sum. The only defense made, so far as the evidence discloses, is that the compensation contracted for was excessive, because of the signal success of the salvors within the short time employed. There was absolutely no proof of any fraud or bad faith on the part of salvors in making the contract.

The amount agreed upon was 20 per cent, or less, of the value of the property saved, and was a moderate, if not low compensation, from the outlook before and at the time the contract was made, and, in view of all the facts, was not excessive or unreasonable, and should be paid. It should be added that Lloyds' representative, as well as the master, cabled the owners and advised acceptance of applicants' tender, and the agreement was reached Oct. 12, but not signed until Oct. 15, 1894.

2. The right to agree upon compensation for salvage service, if not practically denied by the opinion of the majority of the Circuit Court of Appeals, is so restricted by it as to discredit and discourage such agreements and thus impair their efficacy. It not only invites litigation, but puts it in the the power of either party to such contract, however fairly entered into, to be relieved of its obligation, if, in view of the time spent and efforts employed in accomplishing the result, the recompense, after the vessel has been rescued, is deemed either too onerous or too inadequate, whatever may have been the conditions and the probabilities before and at the time of making and carrying out the agreement.

A careful scrutiny of the evidence reveals the main, if not the only, contention upon the part of the vessel to be that, considering the time, expense and labor necessary to save the steamer, too large a proportion of her value had been agreed to be paid. This is not the test, but the real and only question is, or should be, was the bargain fairly made? Or, other-

wise stated, did the salvor impose upon or take advantage of the situation of the master and the vessel, and did the latter have a reasonable time for deliberation?

3. The facts fully sustain the fairness and validity of the contract, and the absence of any improper pressure or undue influence from any source. The services consisted of the successful removal of the steamer from the beach where she had been stranded for ten days. The contract was made in writing a week after she went ashore. She had at first struck and pounded upon the bottom, but, her cable parting, had been driven further up and had settled or become embanked in the sand, and so remained until taken off by applicants. She drew over nine feet. The depth where she lay was several feet less, varying with the tides.

There had been full inquiry and careful deliberation on the part of her master as to the best course to be pursued for several days after the stranding. He thoroughly understood the situation, her exposure to the storms of the gulf, and the great probability, next to certainty, that she would, in the heavy weather which was to be expected at any time in October, be either wholly wrecked, or greatly lessened in value by breaking up, or becoming still more deeply imbedded in the sand, one of which results would have inevitably ensued, according to the history of similar wrecks upon the shores of the gulf. He communicated with his owners by cable during this period and had their approval of the contract. He also sought the advice of the charterers, of the pilots of the port, and of masters of other vessels, whose views agreed with his, and the contract was also with the full approval of Lloyds' agent, who represented the insurance companies. After the fullest investigation, he acted upon his own judgment in engaging libelants to take off his vessel, which conclusion was sustained by all the facts, as

well as by the disinterested information and advice of those with whom he had conferred.

4. Upon these undisputed facts a question of far-reaching importance and gravity arises, affecting the right of freedom of contract, and, as a consequence, valuable maritime interests. Are contracts made upon land, for the relief of stranded vessels, with full knowledge of existing conditions and after many days' delay, subject to the same rules as salvage contracts made at sea by ships in distress without time for deliberation or opportunity to seek other assistance? If the same rules are applicable to both, then were the circumstances attending the making of this contract, as well as those preceding and following it, such as to destroy its validity, and to authorize the substitution of the idea of a majority of the Circuit Court of Appeals as to what is a proper compensation, for the solemn agreement of the parties themselves, fairly entered into, without compulsion, overreaching or bad faith of any kind? Upon the other hand, should not parties in such cases as this "understand that contracts fairly entered into will be strictly enforced in admiralty as well as elsewhere?"

5. A brief outline of the facts proven is given in order that this court may perceive the necessity of reviewing the entire record and correcting the judgment of the Circuit Court of Appeals, which reversed that of the trial court. The latter had the witnesses before it, heard them testify, and, after a full and painstaking consideration of the evidence, argument and authorities, on October 29, 1895, entered its decree, finding, among other things, that the services were rendered in saving the steamship under a contract, in writing made between libelants and her master, who was duly authorized to make the same. That it was a lawful contract and was entered into by the master of the steamship with full knowledge, or means of knowl-

edge, of the said master and of the owners of said steamship of all the conditions then existing, and that the amount named in the contract was not unreasonable, under the conditions.

The decree was, upon appeal by the Elfrida, substantially sustained as to all the findings above recited, except the last, and as to that a majority of the Circuit Court of Appeals held that the amount named was excessive, and reduced it from the sum contracted to be paid to $10,000.00. Circuit Judge Pardee dissented from this annulment of the contract in an opinion so lucid and strong as to justify, if it does not require, a thorough review by this tribunal of a case in which one of the ablest and most experienced admiralty judges in this country has arrived at an opposite conclusion from that reached by the two other members of the court.

A petition for a rehearing was duly made and overruled by the Honorable Circuit Court of Appeals January 26, 1897.

6. The contract for salvage services and compensation should have been enforced, as it was shown, without conflict, that the salvor took no advantage whatever of his situation. The bargain made was not unreasonable. There was no evidence whatever of unfairness or bad faith on the part of the salvors, and the law of contracts is applicable to such agreements as this, at least to the extent of enforcing them in admiralty, where there has been a definite, distinct agreement, with ample time for the parties to consider what they were doing, and where the contract was considered by all at the time it was made to be fair and reasonable.

Post v. Jones, 19 How., 150.

The Agnes I. Grace, 2 U. S. App., 323, 51 Fed., 959.

Jones on Salvage, 99.

The conditions in this age are far removed from those prevailing in the twelfth century, when the laws of Oleron were

promulgated, cited in the majority opinion, and which were essentially directed to the prevention of piracy or extortion of agreements from small wooden vessels in distress upon the high seas, far from any relief, and completely at the mercy of the rescuer.

The just and enlightened rule is as stated in Harley v. 467 Bars R. R. Iron, 1 Sawyer, 2: "Parties may agree on the amount of salvage compensation, or on the principles upon which it shall be adjusted, and such agreement, *if fairly made and no advantage be taken of ignorance and distress, is readily upheld by the courts.*" As observed in that case, in an undertaking of this kind, much is conjectural and salvors necessarily take chances.

Was this agreement fairly made? The master upon shore was surrounded by his friends and those whose interests were the vessel's interest, the ship's agents, the insurance agent, the pilots, in daily communication with his owners, and he himself testified that, if a storm came on, the vessel would be almost inevitably a total loss, having himself failed with anchors, tug boat and other appliances to get his ship off, and having badly strained her and lost a part of her equipment in so doing, the vessel daily settling in the sand, having applied to other sources of relief at hand, and having accepted the lowest offer, after having declined to submit the matter to the courts, being himself a mariner of thirteen years experience and familiar with similar conditions; these facts, and, in fact, the entire record shows that the agreement was a fair and reasonable one and that no advantage of any kind was taken.

7. In such a case, as Judge Story remarked: "The court not only looks with indulgence upon such a contract, but endeavors to fortify itself against the exercise of mere discretion by adopt-

ing and enforcing such a contract as equally just, moral and conscientious."

Bearse v. 340 Pigs of Copper, 1 Story, 323.

All such contracts are presumed *prima facie* to be fair, but if proven to be unconscionable, a court of admiralty, like a court of equity, would not enforce them.

In the Silver Spray (E. D. Mich.), 1 Brown's Adm., 349, the court found that although the bargain was a hard one for the libelant, that it would not be set aside for that cause alone. That he had ample time for consideration, and there was no pretense of any fraud or deception used towards him, or that he did not know the situation and the difficulties in the way. On page 354 the court says: "The contract appears to have been entered into openly and fairly in all respects, and there is no principle and authority upon which the court can disregard it, or make a new contract for the parties. It must be enforced as it stands."

As said in The True Blue, 2 W. Rob., 176, where the contract was enforced, although the disparity was great: "*Parties must understand that contracts fairly entered into will be strictly enforced in admiralty as well as elsewhere.*"

8. The case that we have stated is the substance of all the testimony, and there is no material conflict. The opinion of the majority of the Honorable Circuit Court of Appeals is mainly devoted to a consideration of the question as to what would be a proper and sufficient award of salvage in the first instance, independent of any agreement between the parties; in brief, the court treats the contract as nothing more than an indication of what the parties thought the work should or might be done for, but in no wise controlling. Even upon the basis of salvage, without an agreement fixing compensation, Judge Speers loses

sight of the risk incurred by the salvors, and especially the risk of the time-limit of twenty-one days, but proceeds to make a new contract for the parties, such as they might have made had they known in advance the length of time and amount of effort it required, as shown by subsequent events. This is not the criterion. As we have remarked, such a test applied to any contract in admiralty, or elsewhere, would, in the vast majority of cases, require a readjustment of the compensation. This should not be determined by looking backward, but the court should, as near as may be, place itself in the position of the parties, and under the conditions which existed at the time they entered into the agreement. Having done this, unless the amount agreed to be paid for a successful issue is so exorbitant as to shock the conscience, or to afford satisfactory evidence of fraud or duress, then the agreement should be enforced.

Admiralty does not espouse as its wards the masters and owners of vessels who make their contracts upon land, with every facility for determining what course to pursue, and uninfluenced by the imminence of danger or distress, or absence of other means of rescue, such as confront a vessel wrecked upon an uninhabited coast or helpless upon the ocean.

The authorities reviewed in Judge Pardee's opinion vindicate its soundness, and we refer to that opinion as a part of this application. It is a clear and true exposition of the facts of this case, and is in harmony with reason and the broadening spirit of modern jurisprudence and legislation, which, while according to individuals, the greatest latitude of conduct consistent with their duties as members of society, yet requires of them the discharge of their just obligations, and discountenances repudiation or paternalism, both of which are essentially involved in the defense. An examination of the record in this case will show our clear right, under the acts of Con-

gress and their construction by this court, to the *certiorari* asked for. In addition to the authorities hereinbefore cited, we call attention to the following:

Bondies v. Sherwood, 22 How., 214.
The Alert (S. D., N. Y.), 55 Fed., 721.
The G. W. Jones (S. D., N. Y.), 48 Fed., 925.
The R. D. Bibber (C. C. E. D., Tex.), 33 Fed., 55.
The H. D. Bacon (Mo.), 1 Newb. Adm., 279.
The Adirondack, 2 Fed., 392.
The Guadalupe, (E. D., Tex.), 20 Fed., 445.
The Connemara, 108 U. S., 352.
The Sybil, 4 Wheaton, 98.
The North Erin (E. D., N. Y.), 71 Fed., 430.

9. Your petitioners, therefore, submit that the grave importance of the questions presented, the inviolability of contracts, the absolute freedom from fraud, undue advantage or improper conduct of any kind on the part of the salvors, together with the fact that the member of the court possessing the longest and largest experience, most forcibly dissents from the conclusion of his brethren, all require that full consideration of the circumstances of this case, which can only be gained by an examination of the entire record, and thereby this court can best determine and settle the questions which arise.

We respectfully and earnestly urge that the decision of this case by two of the three judges of the appellate tribunal overrules, in effect, its former decisions and is directly opposed to the views of this court announced in the cases which we have cited.

Wherefore, your petitioners pray that this Honorable Court will be pleased to grant a writ of *certiorari* in this case to the United States Circuit Court of Appeals for the Fifth Circuit to

remove the whole record and cause into this honorable court and for such other and general relief as to this court may seem just.

CHARLES CLARKE AND ROBT. P. CLARKE,
By their Proctors,
JAMES B. & CHARLES J. STUBBS,
JOSEPH H. WILSON, AND
HENRY M. EARLE.
W. W. Baker

Eastern District of Texas,
City and County of Galveston.

James B. Stubbs, being duly sworn, says that he is a member of the firm of James B. & Charles J. Stubbs, proctors for libelants, and is authorized to make this verification, that he has read the foregoing petition and knows the contents thereof, and that the same is true to the best of his knowledge and belief. The sources of deponent's knowledge and the grounds of his belief are found in the proceedings and in the record of the cause in the District Court and in the United States Circuit Court of Appeals for the Fifth Circuit.

JAMES B. STUBBS.

Sworn to and subscribed before me this 1st day of February, A. D. 1897.

[SEAL] E. BURKEY,
Notary Public, Galveston County, Texas.

I hereby certify that I have examined the foregoing petition, and, in my opinion, it is well founded, and the prayer of the petitioners should be granted.